Supreme Court, U.S.
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No. 02-1501

In the
Supreme Court of the United States

MILLER WASTE MILLS, INC.,
d/b/a RTP COMPANY,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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REPLY ARGUMENT

Petitioner RTP Company respectfully offers this reply argument in response to the Board's Brief in Opposition to the Petition for Certiorari.

A pivotal issue in this case and many others like it is the propriety of the Board's affirmative bargaining order when the Board itself delayed processing the case for several years. (See Pet. i, Issue 1). This case warrants review if for no other reason than the Board did not and cannot justify its administrative appointment of the UAW as the bargaining agent for employees who were not even working for RTP when the underlying events in this case arose years ago. In the Board's Brief in Opposition (much like the Board's Order), the Board essentially ignores[1] its own delay and the

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[1] The only point in the Brief when the Board addresses its own "administrative delay" is when it argues that it was under no obligation to grant RTP's Motion to reopen the record to present evidence of why changes within the workforce and the passage of time rendered a bargaining order inappropriate. (See Board Brief at 15-16). The Board denied Petitioner an opportunity to reopen the record on the grounds that the Motion was untimely because Petitioner should have brought the Motion as soon as any "circumstances" changed. (Pet. C-2,3) As such, the Board apparently expects employers to present evidence on changed circumstances while the Board's decision is still pending, before the employer even knows whether or not it won or lost on the underlying merits in a withdrawal of recognition case. To do so would require clairvoyance on the part of the employer. Prior to the time when the Board actually issues its decision, the employer has no idea whether the Board will even hold that a ULP occurred. In other words, adopting the Board's reasoning would require an employer to file a motion to reopen the record regarding a *possible* bargaining order when the employer does not even know if it won or lost, much less when the Board might issue its decision.

The Board's reasoning that employers should be required to file contingent motions to reopen the record just in case they eventually lose

practical ramifications that said delay will have if this bargaining Order stands. Reducing the Board's Brief to its basic components, the Board essentially takes the position that it is free to take as long as it wants (in this case, well over three years) to decide withdrawal of recognition cases, and if it finds an employer in violation of the Act, an affirmative bargaining order is *the* remedy even where the Board makes no effort to explore whether or not a Board-conducted election might better protect the Section 7 rights of *current* employees.

The Board simply will not consider the detrimental by-products of its procrastination. In the Board's own words, the Board "does not consider passage of time and turnover among bargaining unit employees in determining whether a bargaining order is appropriate, but rather assesses the appropriateness of this remedy based on the situation at the time the unfair labor practices were committed." Cogburn Healthcare Center, 335 NLRB No. 105 at slip op. p. 5 (2001); see also Overnite Transportation Co. v. NLRB, 280 F.3d 417, 437 (4th Cir. 2002). Under the Board's standard, the passage of time is apparently irrelevant.

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should be rejected. See Montgomery Ward & Co., Inc. v. NLRB, 904 F.2d 1156, 1158 (7th Cir. 1990) (employer filed motion to reopen record after Board imposed affirmative bargaining order, which the Board then denied; the Court remanded, instructing the Board to consider changed circumstances). Evidence of changed circumstances only becomes relevant *after* the Board decides that a bargaining order is the appropriate remedy. Requiring an employer to file a motion to reopen the record before knowing whether the Board intends to issue a bargaining order puts the cart before the horse. It is patently unreasonable to expect an employer to file a new motion every time another employee quits or is terminated.

That conclusion does not reflect the realities of today's workplace. The Board has no idea whether RTP's current employees were even employed when RTP sent out its three allegedly unlawful letters back in 1998. The Board cannot seriously claim to know whether RTP's current employees actually want to be represented by the UAW, as opposed to some other union, or no union at all. A Board-conducted election, with its procedural safeguards, could have answered all of these questions. Instead, the Board administratively ensconced the UAW as the bargaining representative "for a reasonable period of time." (Pet., B-14-22).

Unfortunately, a three and one-half year delay is all too common in cases before the Board. For example, in J.L.M., Inc. v. NLRB, 31 F.3d 79 (2d Cir. 1994), the Court reviewed a bargaining order that was issued three and one-third years after the last ULP — nearly the same amount of time that passed here. In doing so, the Court noted that:

> The passage of so much time sheds doubt on the Board's finding that the [employer's] employees continue to feel the effects of the ULPs. In addition to the possibility that employees may have totally forgotten the incidents, enough time may have passed to have at least made the chance of a fair rerun election greater than "slight."

Id. at 384.

The same is true here. The Board erred by summarily refusing to consider the effects of its own delay.

In short, this case should be reviewed because, *inter alia*, the Board should not be able to cavalierly impose affirmative bargaining orders where the Board refuses to consider the effect of its own delay on current employees' Section 7 rights, and when this union -- the UAW -- never demonstrated that it actually had the numerical support of the majority of RTP's employees at any time. RTP respectfully submits that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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